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## **MEDIA SEARCHES AFTER *ZURCHER v. STANFORD DAILY*: A STATUTORY APPROACH**

### **INTRODUCTION**

On Friday, April 9, 1971, members of the Palo Alto Police Department and the Santa Clara County Sheriff's Department were called to Stanford University Hospital to remove a group of demonstrators that had seized the hospital administrative offices and occupied them since the previous afternoon, barricading the doors at both ends of the corridor adjacent to the administrative offices. Failing to convince the demonstrators to leave peacefully, the police forced their way into the offices held by the demonstrators. While the majority of police were entering the west end of the corridor, a group of demonstrators charged through the doors at the east end and attacked nine officers stationed there, injuring all nine. There were no police photographers at the east end of the corridor; most of the newsmen and bystanders present were at the west end of the hallway. Only two of the assailants could be identified by the nine officers themselves.<sup>1</sup>

A special edition of the Stanford University student newspaper, *The Stanford Daily*, was published Sunday, April 11, containing photographs and articles about the hospital protest. The content of the photographs, credited to a *Daily* staff member, suggested they had been taken at the east end of the hospital corridor during the Friday incident.<sup>2</sup>

The following day, the Santa Clara County District Attorney's office obtained a warrant for the immediate search of the *Daily's* premises for negatives, film, and pictures of the hospital incident. The warrant was issued on probable cause that negatives, film, and pictures showing demonstrators who assaulted the police officers, would be found in the newspaper offices. The warrant affidavit did not assert that any member of the newspaper staff had participated in the unlawful acts at

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1. *Zurcher v. Stanford Daily*, 436 U.S. 547, 550-51 (1978).

2. *Id.* at 551.

the hospital.<sup>3</sup>

Pursuant to the search warrant, the *Daily's* photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched. During the search, the officers had the opportunity to view notes taken by reporters that contained information obtained from sources in confidence with the understanding that the name of the source would not be disclosed. The officers also saw or read business and personal correspondence of the *Daily* and its staff. No materials relevant to the hospital incident were found other than the photographs that had already been published on April 11; nothing was removed from the newspaper offices.<sup>4</sup>

The search described above is an example of a dozen that have been conducted in California in recent years<sup>5</sup> and is indicative of an expanding practice.<sup>6</sup> The use of search warrants to seize material from the press is an issue that has been much in the news and in the courts in recent years, raising the question of how the interests of society in a free press are to be balanced against the public interest in effective and efficient law enforcement.

This comment explores in part how this balancing has been approached in the area of media searches. In the case of *Zurcher v. Stanford Daily*,<sup>7</sup> the United States Supreme Court rejected the argument that the fourth amendment establishes special requirements for search warrants that are issued to search for material in possession of one not suspected of a crime. In so holding, the Court declined to recognize any special privilege for newspapers or other media that might be

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3. *Id.*

4. *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 127 (N.D. Cal. 1972).

5. *Justice Department Policy Concerning News Media Search Warrants: Hearing Before A Subcomm. of the House Comm. on Government Operations*, 95th Cong., 2d Sess. app. 6 (1978) (letter by the Reporters Committee for Freedom of the Press). Police obtained search warrants for the following press facilities since the search of the *Daily* offices: October 1973, *Berkeley Barb*, Berkeley; February 1974, *Berkeley Barb*, Berkeley; March 1974, *KPFA-FM*, Berkeley; June 1974, *Berkeley Barb*, Berkeley; June 1974, *Phoenix*, San Francisco; October 1974, *KPFK-FM*, Los Angeles; October 1974, *KPOO-FM*, San Francisco; October 1974, *L.A. Star*, Los Angeles; December 1977, *KRON-TV*, San Francisco; December 1977, *KTVU-TV*, San Francisco; December 1977, *KGO-TV*, San Francisco; December 1977, *KPIX-TV*, Oakland.

6. *The Highest Court, The Toughest Issues*, THE STANFORD MAGAZINE, Fall/Winter 1978, at 35 (an interview with Gerald Gunther) (on file at the Santa Clara Law Review).

7. 436 U.S. 547 (1978).

searched by law enforcement officials pursuant to a warrant.<sup>8</sup>

There are, however, significant problems with police searches of the media.<sup>9</sup> In recognition of these problems, Cali-

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8. *Id.* at 567.

Newspersons and the courts have continually clashed over the right of newsmen to protect their confidential sources. The major United States Supreme Court case dealing with this problem is *Branzburg v. Hayes*, 408 U.S. 665 (1972). The *Branzburg* Court held that newsmen did not have an absolute first amendment privilege against subpoenas that sought information regarding their confidential sources.

The argument has been made that after *Branzburg* the press enjoys no greater constitutional protection than do ordinary citizens. Justice White, however, speaking for the majority in *Branzburg*, noted the Court limited its holding to grand jury proceedings and a reporter's right to withhold information. *Id.* at 682. Furthermore, the Court recognized that the news gathering process merited at least limited first amendment protection. *Id.* at 681. Acknowledging the existence of such a right forced the Court to take a balancing approach to the first amendment, weighing the public interest in the news gathering potential of confidential source relationships against the public interest in apprehending criminals. *Id.* at 690-702. The Court concluded that while disclosing confidential sources may infringe on first amendment rights in news gathering, under the specific facts before the Court, the public need for controlling crime outweighed the injury to first amendment interests.

Because the majority opinion in *Branzburg* was narrow and riddled with qualifications, the question remained as to whether reporters possessed a first amendment right to withhold confidential information from law enforcement officers with a valid search warrant. It was not until the *Zurcher* decision that this issue was resolved.

9. Media searches normally involve "third party" searches: the reporter whose property is seized is not suspected of criminal activity but merely possesses information concerning criminal suspects. This does not mean that reporters are excluded from constitutional protection. Rather, third parties not suspected of crimes are entitled to the same fourth amendment protections as are suspects. "This [fourth amendment] guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike." *McDonald v. United States*, 335 U.S. 451, 453 (1948). See also *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Trupiano v. United States*, 334 U.S. 699 (1948); *Johnson v. United States*, 333 U.S. 10 (1948).

In order for official conduct to come within the scope of constitutional protection, there first must be a determination that the conduct is a search or seizure within the meaning of the fourth amendment. Prior to 1967, the amendment's protection turned upon the presence or absence of a physical intrusion into a constitutionally protected area. This protected area concept was discarded in *Katz v. United States*, 389 U.S. 347 (1967). In excluding evidence of the petitioner's end of phone conversations overheard by FBI agents using an electronic listening device attached to a phone booth, the Court observed:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection. . . . [But] what he seeks to preserve as private, even if in an area accessible to the public, may be constitutionally protected.

*Id.* at 351. Justice Harlan, writing a concurring opinion in *Katz* that has been treated as if it were the majority view (See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Freie*, 545 F.2d 1217 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *People v. Berutko*, 71 Cal. 2d 84, 453 P.2d 721, 77 Cal. Rptr. 217 (1969)), stated that the

fornia recently amended its Penal Code to minimize the impact of the Supreme Court's decision in *Zurcher* as applied to press searches.<sup>10</sup> This new legislation will be analyzed below in terms of what are perceived to be its benefits and failings. Finally, an alternative legislative approach at the federal level will be suggested that would better serve the interests involved.<sup>11</sup>

### LEGAL HISTORY OF *Zurcher v. Stanford Daily*

One month after the search of its newsroom, the *Stanford Daily* and members of its staff brought a civil rights action<sup>12</sup> under section 1983 of Title 42 of the United States Code<sup>13</sup> to

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protection of the fourth amendment attaches if an individual has a "reasonable expectation of privacy." 389 U.S. at 360 (Harlan, J., concurring). Consequently, because the sanctity of a person's home or office and privacy are the controlling considerations in fourth amendment analysis, the rights of third parties to be free from unreasonable searches and seizures are afforded full constitutional status.

When there is a showing of a reasonable expectation of privacy, the fourth amendment requires that a search warrant be secured upon a showing of probable cause supported by oath or affirmation that fruits, instrumentalities, or evidence of a crime will be found. U.S. CONST. amend. IV. Furthermore, the warrant must particularly describe the place to be searched and the persons and things to be seized. *Id.*

Traditionally, the "mere evidence" rule prohibited the issuance of a search warrant that commanded the seizure of mere evidence. In 1967, the Supreme Court abolished this rule in *Warden v. Hayden*, 387 U.S. 294 (1967), insofar as it allowed a search for evidence of a crime based on probable cause and a proper warrant. The Court reserved judgment as to some items of evidentiary value "whose very nature precludes them from being the object of a reasonable search and seizure", *id.* at 303, because their very nature requires the owner to become a witness against himself. In addition, *Warden* did not decide the issue of whether searches for mere evidence of a crime believed to be possessed by innocent third parties required special justification. In *Andresen v. Maryland*, 427 U.S. 463 (1976), the Court resolved the first issue by finding that a search and seizure, pursuant to a valid warrant, of business records in the defendant's possession, some of which were "testimonial" in nature, did not violate the fifth amendment. The second issue was left unresolved until the *Zurcher* decision allowed third party searches upon a finding of probable cause that the person possessed evidence of a crime.

Finally, it should be noted that very few cases deal with the fourth amendment rights of innocent third parties because these persons do not usually object to searches and seizures when they are not suspected of criminal activity. In addition, this paucity of cases may be attributable to the fact that law enforcement officials often rely upon the subpoena duces tecum, rather than a search warrant to secure desired information. See *Stanford Daily v. Zurcher*, 353 F. Supp. at 127-28.

10. See notes 48-50 and accompanying text *infra*.

11. See notes 72-83 and accompanying text *infra*.

12. 436 U.S. at 552.

13. 42 U.S.C. § 1983 (1976) provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be sub-

have the search declared illegal and unconstitutional. The plaintiffs claimed the search of the *Daily's* office deprived them, under color of state law, of rights secured to them by the first, fourth, and fourteenth amendments of the United States Constitution. In addition to declaratory relief, the plaintiffs also sought an injunction to prevent similar police conduct in the future.<sup>14</sup>

Federal District Court Judge Robert Peckham refused to grant injunctive relief, but on summary judgment for the plaintiffs found the search unconstitutional and granted declaratory relief. In so doing, Judge Peckham rejected the traditional search warrant procedure as "unreasonable per se"<sup>15</sup> when employed against non-suspects. The trial court held that the fourth and fourteenth amendments barred the issuance of a warrant to search for materials in possession of one not suspected of a crime unless there is probable cause to believe, based on facts presented in a sworn affidavit, that a subpoena duces tecum<sup>16</sup> would be impracticable.<sup>17</sup>

The lower court further held that when the object of the search is a newspaper, first amendment considerations require that a search warrant will be permitted "only in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction, and (2) a restraining order would be futile."<sup>18</sup> These preconditions were not satisfied in the search of the *Daily's* offices,

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jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

Jurisdiction was founded upon 28 U.S.C. § 1343(3) (1976) which reads:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.

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(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or all persons within the jurisdiction of the United States.

14. 353 F. Supp. at 126.

15. *Id.* at 127.

16. See text accompanying notes 73-76 *infra*.

17. 353 F. Supp. at 127.

18. *Id.* at 135 (emphasis in original).

and therefore the search was illegal.<sup>19</sup> The Ninth Circuit affirmed *per curiam*, adopting the District Court's opinion.<sup>20</sup>

The United States Supreme Court, in a five to three decision reversing the lower court,<sup>21</sup> held there is no constitutional requirement that resort to a subpoena duces tecum be shown impractical before a search warrant may issue even though the owner or possessor of the place to be searched is not suspected of criminal involvement.<sup>22</sup>

Justice White, writing for the majority, rejected the notion that fourth amendment<sup>23</sup> protections vary depending on the character of the search victim. In the Court's view, Judge Peckham's holding was a "sweeping revision"<sup>24</sup> of fourth amendment law:

Under existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime may be found. . . .

[T]he District Court's holding appears to be that state entitlement to a search warrant depends on the culpability of the owner or possessor of the place to be searched and on the state's right to arrest him. The cases are to the contrary.<sup>25</sup>

In light of the foregoing, Justice White concluded constitutional rights would not be violated if a search of third parties has been conducted pursuant to a valid warrant issued on probable cause and the warrant correctly specifies the area to be searched and the property to be seized.<sup>26</sup>

Turning to the first amendment issues, the Court rejected the argument that the amendment requires a subpoena duces tecum rather than the more intrusive search procedure when

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19. *Id.*

20. *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977).

21. Justice Brennan did not take part in the opinion. 436 U.S. at 547, 548.

22. 436 U.S. 547 (1978).

23. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

24. 436 U.S. at 554.

25. *Id.* at 554-55 (emphasis in original).

26. *Id.* at 556.

the premises to be searched are media offices. In the Court's view, the framers of the Constitution, aware of the importance of a free press, did not insist that warrants issued for search of press facilities meet a greater burden than the test of reasonableness and the requirement that warrants be issued by a neutral magistrate.<sup>27</sup> The Court found that the preconditions for a warrant "should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."<sup>28</sup>

The Court emphasized, however, that where "the materials sought to be seized may be protected by the first amendment, the requirements of the fourth amendment must be applied with 'scrupulous exactitude'."<sup>29</sup> To illustrate, the Court cited the case of *Stanford v. Texas*<sup>30</sup> where it held a warrant authorizing the search of a home for all books and materials relating to the Communist Party was invalid because the warrant was equivalent to a general warrant, leaving the extensiveness of the search to the whim of the officer executing the warrant. According to the Court, the warrant requirement should be administered so as to leave as little discretion to the officer in the field as possible. As another example, the Court cited *Marcus v. Search Warrant*<sup>31</sup> where it stated that the Constitution requires a procedure "designed to focus searchingly on the question of obscenity" so that when warrants are sought for the seizure of allegedly obscene material, the arresting officer is not allowed to rely merely on his own judgment of what is obscene.<sup>32</sup>

Finding that the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—had been satisfied, the Court concluded that the search for photographs

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27. *Id.* at 565.

28. *Id.*

29. *Id.* at 564 (citing *Stanford v. Texas*, 379 U.S. 476, 485 (1965) that held the particularity requirement is to be given "the most scrupulous exactitude when the 'things' [to be seized] are books, and the basis for their seizure is the ideas they contain.").

30. 379 U.S. 476 (1965).

31. 367 U.S. 717 (1961) (Missouri statutes and rulings of the state supreme court violated due process under the fourteenth amendment when a warrant for the search and seizure of obscene material could issue upon assertion of single officer that the material was in fact obscene).

32. *Id.* at 732.



at the *Daily* was not unreasonable within the meaning of the fourth amendment, nor had the first amendment been violated. Accordingly, the Court reversed the judgment of the lower courts.<sup>33</sup>

Justice Stewart, joined in dissent by Justice Marshall, found no violation of the fourth amendment but believed the search of the *Daily* infringed on the first and fourteenth amendments' guarantee of a free press.<sup>34</sup> In Stewart's view, unannounced press searches would burden the freedom of the press in that such searches would cause "physical disruption of the operation of the newspaper."<sup>35</sup> An even more serious burden, in Stewart's mind, was the "possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves."<sup>36</sup> As a result, Stewart concluded that unannounced police searches of newspaper offices infringed on the "constitutionally protected function of the press to gather news and report it to the public."<sup>37</sup>

In a separate dissenting opinion, Justice Stevens based his disagreement with the majority entirely on the "innocent third party" issue. Justice Stevens argued that mere documentary evidence in the possession of such a third party should be sought by subpoena. In this case, because the *Daily* was an innocent third party not involved in any wrongdoing, there was no justification for the search and it was therefore unreasonable and unconstitutional.<sup>38</sup>

#### THE INTERESTS INVOLVED IN SEARCH AND SEIZURE

When there is a search of press facilities, as in the *Zurcher* case, significant interests come into conflict: those of government, the press, and the public.

##### *Governmental Interests in Law Enforcement*

The primary function of law enforcement is the investigation and prosecution of crime to insure "security for the person and property of the individual" from "reprehensible con-

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33. 436 U.S. at 568.

34. *Id.* at 570-71.

35. *Id.* at 571.

36. *Id.*

37. *Id.* at 574.

38. *Id.* at 577-83.

duct forbidden to all other persons."<sup>39</sup> A search is a highly effective tool to facilitate this function. Furnishing efficient means of obtaining such evidence of criminal activity as narcotics, contraband, or weapons, searches arguably prevent future crimes as well as help convict the guilty. To the extent police are denied the use of search warrants, the prosecution of crime could become more difficult and expensive.<sup>40</sup>

Law enforcement agencies obviously have an interest insuring that evidence sought is not destroyed or removed beyond jurisdictional reach. Because a search warrant may be obtained swiftly, anyone disposed to destroying or removing evidence would have less time to do so where this technique is employed.

### *Press and Public Interests*

While compatible with governmental interests in acquiring information about criminal activity, media searches collide with important interests of the press and society.

An officer executing a valid warrant may search any place the items named in the warrant might be located.<sup>41</sup> Assuming that the object of a newsroom search will most often be documents and that the police will generally not know the layout of a reporter's office, police will have access to virtually all information in the reporter's possession. Consequently, the police may view highly confidential information. This is illustrated by the *Daily* incident where, during the course of their search, officers scrutinized reporters' notes containing information that was obtained by reporters in exchange for their promise that neither the information nor the source would be revealed.<sup>42</sup>

Knowing police may gain access to confidential files through the use of a search warrant, potential confidential sources will justifiably fear exposure; they will be discouraged from passing information to the press, having a dramatic effect on the media's news gathering function. As one commentator suggests:

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39. *Branzburg v. Hayes*, 408 U.S. 665, 690, 692 (1972).

40. See Liebman, *Search and Seizure of the Media: A Statutory Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 973-74 (1976).

41. See generally 68 AM. JUR. 2d, *Searches and Seizures* §§ 84-88 (1973).

42. See note 4 and accompanying text *infra*.

[T]he fabric of journalism on a daily basis is so intertwined with obtaining information of a confidential nature that permitting police to search through newsrooms jeopardizes the relationship of every reporter in the newsroom and virtually every person he has talked to; and so undermines the independence and credibility of the press that it would be virtually impossible to operate effectively.<sup>43</sup>

Media searches not only affect the newsgathering function of the press but also the media's news disseminating function. Searches may take several hours. For example, in 1974, police conducted an *eight-hour* search of radio station KPFK-FM in Los Angeles for a New World Liberation Front "communique" regarding a recent bombing.<sup>44</sup> The presence of officers for extended periods of time rummaging through files, listening to tapes, and looking through reporters' notes must necessarily have an adverse effect on the normal functioning of the newsroom. Further, reporters might refrain from investigating controversial matters so as to insure that they are not made the subject of official searches, while editors might be unwilling to run stories that would invite police searches.<sup>45</sup>

When newsgathering and dissemination are impeded as a result of newsroom searches, ultimately the American public suffers because our ability to receive information and ideas is impaired. Moreover, the press' historical function has been to expose corruption and misdeeds in the political arena. Serious questions as to the press' ability to investigate government arise when a local magistrate, an integral part of the political structure, can issue warrants for searches of newsrooms. Media searches also collide with journalists' legitimate privacy interests. In the *Daily* search, police read personal correspondence of the *Daily* and its staff members. It has been suggested that

[m]embers of the press, like participants in other businesses, enjoy constitutionally protected expectations of privacy concerning their media facilities, as well as their homes. Journalists . . . have personal files, memoranda

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43. Statement by Jack C. Landau, *Publisher's Weekly*, June 1978.

44. See *Confidentiality/State Executive—No Notice Police Raids*, 7 *PRESS CENSORSHIP NEWSLETTER* 11-12 (1975); *Confidentiality of News Media Sources: State Executive*, 6 *PRESS CENSORSHIP NEWSLETTER* 30 (1975).

45. See Liebman, *supra* note 40, at 957, 986.

and numerous compilations of confidential information which they are constitutionally entitled to shelter from governmental intrusion, even if the business institution rather than the individual technically owns the items.<sup>46</sup>

### A STATUTORY APPROACH

The *Zurcher* Court made clear that the above-mentioned interests of the press and the public with respect to searches are not protected by the first, fourth, and fourteenth amendments. In its decision, however, the Court virtually invited legislation in the area of media searches:

Of course the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resorts to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants.<sup>47</sup>

### California Legislation

In the wake of *Zurcher*, the California Legislature acted to create statutory protections for the news media by amending section 1524 of the Penal Code<sup>48</sup> to prohibit the use of warrants for newsroom searches. Under section 1524, as amended, search warrants shall not be issued "for any item or items described in Section 1070 of the Evidence Code."<sup>49</sup> The cross-reference is to California's so-called shield law, that gives statutory protection to a newsperson, stating that the latter cannot be adjudged in contempt by any judicial, legislative, or administrative body for refusal to reveal a confidential source or unpublished information.<sup>50</sup>

In interpreting Penal Code section 1524, the first inquiry necessarily must be *who* is given protection and *what* materi-

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46. *Id.* at 972.

47. 436 U.S. at 567.

48. CAL. PENAL CODE § 1524(c) (West Supp. 1979). The amended section provides: "No warrant shall issue for any item or items described in Section 1070 of the Evidence Code."

49. *Id.*

50. CAL. EVID. CODE § 1070 (West Supp. 1979).

als are protected under the shield law. Originally, Evidence Code section 1070 provided protections for publishers, editors, reporters, or other persons connected with or employed by a newspaper. In 1962, the protection was extended to employees of radio and television stations, press associations, and wire services. Then, in 1971, the statute was amended to provide protection for information received by a newsperson who had ceased to be so employed. Finally, those employed by magazines or other periodicals were brought under the shield law by a 1974 amendment.<sup>51</sup>

All "unpublished information" receives immunity under Evidence Code section 1070. Unpublished information, for purposes of this immunity, is defined in subdivision (c) of the section:

As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication whether or not published information based upon or related to such material has been disseminated.<sup>52</sup>

In light of the foregoing, Penal Code section 1524 can be read as prohibiting the issuance of warrants for any newsperson's unpublished information. In recent judicial decisions, however, courts have been unwilling to apply the shield law without balancing other interests. Most often, the competing interest has been held strong enough to strike the balance in favor of disclosure by the press.<sup>53</sup>

In *Rosato v. Superior Court*,<sup>54</sup> the *Fresno Bee* had published a copy of a sealed grand jury transcript after the grand jury had indicted a councilman, a land developer, and the former city planning commissioner on counts of bribery and con-

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51. *Id.*

52. *Id.*

53. See, e.g., *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972).

54. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976).

spiracy.<sup>55</sup> Following the publication, the court began proceedings to determine who had violated its order sealing the transcript.<sup>56</sup> Rosato, the reporter who had obtained the transcript, testified he had not received the document from a person subject to the court's order.<sup>57</sup> Nonetheless, the trial court went ahead and questioned court officers who had lawful access to the transcript.<sup>58</sup>

The court of appeal held that the trial court had both the authority to issue the order and the authority to investigate possible violations of its order. The court further held, under the facts of the case, that the defendants' right to a fair trial outweighed any federal or state constitutional privilege. Applying the rationale of *Branzburg v. Hayes*,<sup>59</sup> the court stated that "the right to require such testimony in an investigation growing out of the violation of an order which goes to the right of a criminal defendant to a fair trial is irrefutable."<sup>60</sup> The court also weighed the importance of the integrity of the judicial process against the right of a newsperson not to reveal sources, and when the balance was struck, the court found against the right to refuse disclosure.<sup>61</sup>

In another recent case, *CBS, Inc. v. Superior Court*,<sup>62</sup> the court of appeal held that provisions of Evidence Code section 1070 did not apply to a television network's unpublished video and audio tapes. The decision was based both on the network's failure to show what material, if any, from so-called "outtakes" had not already been disclosed<sup>63</sup> and on the finding that the failure to require disclosure would directly impair the defendants' right to a fair trial. Again balancing the interests involved, the court found against the press' desire not to reveal confidential information.<sup>64</sup>

The two cases illustrate that Evidence Code section 1070 does not provide absolute immunity to newsmen from con-

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55. *Id.* at 199, 124 Cal. Rptr. at 432-33.

56. *Id.* at 201, 124 Cal. Rptr. at 434.

57. *Id.* at 203, 124 Cal. Rptr. at 435.

58. *Id.* at 202, 124 Cal. Rptr. at 435.

59. 408 U.S. 665 (1972) (holding that reporters possess no first amendment right to withhold confidential information from grand juries).

60. 51 Cal. App. 3d at 213, 124 Cal. Rptr. at 442.

61. *Id.* at 214 n.13, 124 Cal. Rptr. at 443 n.13.

62. 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978).

63. *Id.* at 250, 149 Cal. Rptr. at 426.

64. *Id.* at 252, 149 Cal. Rptr. at 427.

tempt citations for willful nondisclosure. Since the courts have refused to apply section 1070 without balancing other interests including the interest in a defendant's right to a fair trial and the interest in the integrity of the court process, the net effect of Penal Code section 1524 as amended is uncertain.<sup>65</sup>

## RESOLUTION BY FEDERAL LEGISLATION

### *Federal Legislation is Desirable*

A number of bills have been introduced in Congress to curtail the effects of the *Zurcher* decision.<sup>66</sup> The Carter Administration recently proposed legislation to protect newsrooms from unannounced searches.<sup>67</sup> In addition, the United States Department of Justice in an *amicus curiae* brief filed in *Zurcher*, argued that news organizations should be exempt from searches:

[I]t can fairly be supposed that federal law enforcement efforts would not be seriously hampered by a decision of this Court approving the "subpoena first" rule of the courts below in the limited context of searches of the press as a neutral "third party" believed to be in posses-

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65. It could be argued that the balance struck in the courts' decisions interpreting Evidence Code section 1070 was dependent upon the particular interests involved in those cases. However, where the interest in confidentiality of sources and information is to be balanced against the government's interest in the investigation of criminal activity through media searches, courts might be willing to read Section 1070 more expansively. In that case, it is possible that a balancing test will not be employed or a balance would be struck in favor of nondisclosure.

Of course the converse is also a possibility: the courts may decide that warrants will issue for media searches under certain circumstances, just as under certain circumstances newsmen have had to disclose sources and unpublished information. If this possibility is realized, it is unclear at this point precisely what circumstances would merit the issuance of a warrant for a media search in California.

It has been suggested that newsmen might enjoy a common law privilege similar to those protecting an attorney-client and husband-wife relationship. The fight for a common law privilege, however, has been almost futile. *See, e.g., Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969) (assertion of common law privilege by the Associated Press denied in a defamation action against the wire service); *People v. Sheriff of New York County*, 268 N.Y. 582, 199 N.E. 415 (1936) (newsman jailed for contempt after he refused to reveal his sources for a story he wrote regarding a grand jury probe into gambling and lottery rackets).

66. *See, e.g.,* H.R. 12952, H.R. 13017, H.R. 13113, H.R. 13168, H.R. 13169, H.R. 13227, H.R. 13305, H.R. 13319, H.R. 13710, S. 3164, S. 3222, S. 3258, S. 3261, 95th Cong., 2nd Sess. (1978).

67. 47 U.S.L.W. 2431.

sion of evidence bearing on a criminal investigation.<sup>68</sup>

Despite the apparent support for federal legislation to limit media searches, no federal bill has yet been enacted. Enactment of a law at the federal level could have significant advantages, not the least of which is national uniformity. Under present law, a California newsperson who steps outside state boundaries would not enjoy the protections of Penal Code section 1524, uncertain as those protections might be. Since newspersons frequently travel in their work, lack of uniformity in protective laws is a substantial concern. Furthermore, if a news source were entangled with a federal offense, the newsgatherer would be subject to the federal courts' jurisdiction, and any state law limiting media searches would not necessarily apply. In *Lewis v. United States*,<sup>69</sup> for example, California Evidence Code section 1070 did not protect the general manager of a radio station who was held in civil contempt for refusing to comply with a federal grand jury subpoena. The district court held that in a case involving a federal question the court may consider state privilege law but that "the rule ultimately adopted, whatever its substance, is not state law but federal common law."<sup>70</sup> Seemingly, if section 1070 is not applicable in federal question cases, neither would be Penal Code section 1524.

A federal law limiting media searches would give newspersons protection independent of the fourth amendment by imposing sanctions for violations of search warrant limitations. For example, as a general deterrent to improper searches, a criminal defendant could be awarded standing to move for exclusion of illegally seized evidence from his or her trial.<sup>71</sup> In addition, damages, criminal penalties, or civil fines

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68. Brief of the United States Department of Justice (*amicus curiae*) at 33-34.

69. 517 F.2d 236 (9th Cir. 1975).

70. *Id.* at 237.

71. As discussed with reference to *Zurcher*, the use of search warrants to seize material from the press also raises the issues associated with search of an innocent third party who merely has possession of information. As such, the newsperson does not have the protection provided by the exclusionary rule, requiring suppression of evidence in a criminal trial when the evidence is obtained in violation of constitutional rights. See generally 68 AM. JUR. 2d, *Searches and Seizures* (1973). The exclusionary rule is circumvented in these circumstances because the evidence seized from a newsperson is frequently used in a trial against another individual who does not have standing to challenge the illegal search since standing is conferred only when the defendant's personal rights are violated. Furthermore, to obtain standing, a defendant must be on the premises at the time of the search, have a proprietary or posses-



could be imposed.

### *Provisions of Federal Legislation*

A federal law that effectively defines and balances the interests involved in media searches should: 1) require law enforcement officials seeking physical evidence from the press to use a subpoena duces tecum; 2) apply to the activities of federal, state, and local governments; 3) provide protection for newsmen by defining the terms "newsmen" and "news-gathering" broadly; 4) allow the limited issuance of warrants in particular specified circumstances; and 5) provide sanctions for the violations of search warrant limitations.<sup>72</sup>

*Subpoena duces tecum requirement.* The proposed legislation should require police to use a subpoena duces tecum to acquire evidence of criminal activity from media sources. Because a subpoena requires a named person to produce certain specified items,<sup>73</sup> it is a less intrusive means of obtaining evidence than a search. The search warrant authorizes police to enter press facilities to personally search for the materials described in the warrant. Moreover, the search may be conducted outside a newsmen's presence, eliminating the possibility that a cooperative journalist will give the police the requested materials so the police will not need to search confidential files or records.<sup>74</sup> Furthermore, a person faced with a search warrant has no opportunity to contest the legality of the search before it occurs,<sup>75</sup> while a person subpoenaed may move to quash the subpoena by arguing that the information sought does not exist, is not in his or her possession, or is not

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sory interest in the premises, or be charged with an offense that includes possession of the illegally seized evidence as a necessary element of the crime. *Id.* In all likelihood, a defendant would not be able to meet these preconditions to standing following a media search. Absent the sanction of exclusion of evidence, the police may not be deterred from illegal searches with the result that newsmen, as innocent third parties, become particularly vulnerable to unlawful searches and seizures.

72. The proposed legislation does not address nor affect the California courts' interpretations of Evidence Code section 1070 as discussed in text accompanying notes 53-65 *supra*. It is doubtful that the legislative branch could control that interpretive function in any event.

73. See, e.g., FED. R. CRIM. P. 17(c). The section provides, in part, that the "subpoena may also command the person to whom it is directed to produce the books, papers, or documents or other objects desired therein." *Id.*

74. See generally 68 AM. JUR. 2d *Searches and Seizures* §§ 84-88 (1973).

75. *Id.*

material.<sup>76</sup>

*Applicability to federal, state and local governments.* The no-warrant rule should extend to federal, state, and local governmental activities. While Congress could clearly restrict the use of search warrants by federal law enforcement agencies, legislation binding the states is also desirable<sup>77</sup> given that most search warrants are issued at the state or local level.

*Broad definitions of "newsgathering" and "newspersons."* The statute should also provide protection from media searches by broadly defining "newsgathering" to mean any information that has been "obtained or prepared in gathering, receiving or processing of information for communication to the public," as now provided by California Evidence Code sec-

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76. See generally 81 AM. JUR. 2d, *Witnesses* §§ 14-22 (1973).

77. Arguably, such limitations on state and local governments would be unconstitutional in light of the Supreme Court's opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976). The Court barred imposition of federal minimum wage standards on state and local government employees, stating: "Congress may not exercise that [commerce clause] power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 855.

In *Usery*, regulation under the commerce clause required a two-step analysis. See generally, J. NOWAK, R. ROTUNDA, J. YOUNG, *CONSTITUTIONAL LAW* 160-63 (1978). First, there must be a finding that an activity regulated by the federal government is essential to state sovereignty. The Court did not define the matters that were essential to the state's function, but merely stated that the state's ability to determine its employees' wages was "an undoubted attribute of state sovereignty." 426 U.S. at 845. The court did, however, stress that local governments must have the freedom to determine ways in which they will deliver services to their citizens. *Id.* at 852.

Once it is found that a federally regulated activity is essential to state sovereignty, the *Usery* Court analysis then requires a further inquiry as to whether the particular regulation impaired the activities of the state. *Id.* The regulation at issue in *Usery* limited the choice of the state as to setting the conditions under which their employees worked and limited their choices as to the delivery of governmental services because it forced the state to make a minimum allocation of resources to certain employees.

Given the facts of *Usery*, it may be construed narrowly. Federal regulations may only be limited when they affect a state's truly governmental activities and when the regulation also imposes a financial burden on the state. Arguably, the regulation of the issuance of warrants by a federal law would not be a regulation of a matter directly related to a state's sovereign function and would not place a financial burden on the states. If this were the case, the commerce clause would provide Congress with sufficient authority for enacting the proposed legislation.

The fourteenth amendment may also provide Congress with the authority to enforce a no-warrant rule. Section 1 of the fourteenth amendment prohibits the states from abridging any privilege or immunity and section 5 grants Congress "the power to enforce by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 1, 5. Assuming first amendment rights are deemed a privilege, the fourteenth amendment provides a reasonable basis for the law.

tion 1070.<sup>78</sup>

"Newsperson" should be defined so that protections could extend to any person or "legal entity" that gathers or disseminates news through any news medium. Such a definition is

preferable to a definition by a specific list because all news disseminators should be included on the face of the statute to preclude uncertainty in the minds of newsmen and hearing officers as to whether protection has been afforded.<sup>79</sup>

The term "legal entity" is used to afford protection to partnerships, corporations, and associations that function in this sphere.

It should be acknowledged that the decision in *Zurcher* not only rejected special treatment for the media from police searches, but also denied special protection to all third parties. The legislation, as proposed, only overrules *Zurcher* to the extent that the press will be immune from search warrants absent special circumstances. The problems involved in third party searches require special considerations that are outside the scope of this comment. Notwithstanding searches of other innocent parties, as a result of the proposed legislation, the press is afforded a "preferred status". Such a position, however, is justifiable given the important press functions of gathering information, stimulating public discussion, and criticizing government.

*Exception to the no-warrant rule.* The proposed legislation should contain a limited exception allowing searches under certain conditions. For example, warrants might issue for the purpose of searching for and seizing contraband, the fruits of a crime, or things criminally possessed, or property that is or has been used as a means of committing a criminal offense.<sup>80</sup> Under this provision the usual procedural requirements in obtaining a search warrant would, of course, have to be satisfied.

As noted earlier, Judge Peckham suggested in his district court decision in *Stanford Daily v. Zurcher* that warrants

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78. CAL. EVID. CODE § 1070(b) (West Supp. 1979).

79. Note, *Newsperson's Privilege in California: The Controversy and Solution*, 29 HASTINGS L.J. 375, 407 (1977).

80. Legislation which incorporated these suggestions was recently proposed in Pennsylvania. See Pennsylvania S.B. 1597 (introduced Sept. 1978, but failed to report out of committee).

may issue if there is the possibility of the imminent destruction of evidence.<sup>81</sup> This exception, rejected here, would conceivably be difficult to limit and could result in a "chilling effect" the legislation is intended to foreclose. It is possible, for example, that sources might still be inhibited by the fact that law enforcement officials could learn their identities through searches conducted pursuant to this exception. Alternatively, law enforcement officials could rely on statutes that allow criminal penalties for destruction of evidence.<sup>82</sup>

*Sanctions for violation of search warrant limitations.* Finally, liability should be imposed on an agency issuing warrants in violation of the proposed legislation's provisions. Officers signing an affidavit or executing a search that violates the limitations on searches should also be subject to liability. Money damages and attorney's fees could be awarded upon a finding of a violation. Also, standing could be granted the criminal defendant against whom illegally seized evidence is being used.<sup>83</sup>

### CONCLUSION

Media searches present a problem in balancing the interests in a free press against that of effective law enforcement. While searches facilitate the government's interest in ob-

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81. See text accompanying note 18 *supra*.

82. Several states have criminal statutes that prohibit the destruction or alteration of evidence by persons who know that such information is needed in pending investigations or trials. See, e.g., IDAHO CODE 18-2603; NEV. REV. STAT. § 199.220 (1973); OR. REV. STAT. § 162.295 (1971).

83. See SUBCOM. ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS, SEARCH WARRANTS AND THE EFFECTS OF THE STANFORD DAILY DECISION, H.R. REP. NO. 1521, 95th Cong., 2d Sess. 10 (1978).

An application of the proposed federal legislation to the *Zurcher* facts illustrates the protection that would result. In *Zurcher*, police obtained a warrant in an *ex parte* proceeding for photographs and film of the hospital incident. Under the proposed legislation, the *Daily*, as a newsgathering entity within the definition provided, would be protected from the search. Consequently, police would have to secure a subpoena to obtain the desired evidence.

If the federal law were in effect, and the police nonetheless secured a warrant and subsequently searched the *Daily* offices, the search would be illegal because the material sought would not fall within the limited exception to the no-warrant rule. As a result, liability could be imposed on the officer signing the affidavit that secured the warrant and on the officers executing the search. Furthermore, had the search uncovered information leading to the identification and subsequent prosecution of the demonstrators who had attacked the police, the demonstrators would have standing to move for exclusion of the illegally obtained evidence at trial.

taining information of criminal activity, searches of the media impede newsgathering and dissemination. The press' ability to function is most seriously impaired when, in the course of a search, the police are able to view confidential source information.

Despite these problems with media searches, the United States Supreme Court in *Zurcher v. Stanford Daily* rejected the notion that the Constitution requires any special safeguards for the press. The Court found that the media would be sufficiently protected under the Constitution if the fourth amendment was applied with "scrupulous exactitude" by magistrates issuing warrants for the search of news facilities.

The California Legislature, recognizing the need for greater protection than that afforded by the *Zurcher* Court, amended its penal code to require the use of a subpoena duces tecum by police for obtaining information from the press. But the limited reach and the uncertain application of the California law makes a no-warrant statute at the federal level necessary.

The federal legislation proposed in this comment, limiting media searches to a small number of specified circumstances, would provide greater protection for the media than that presently available under the federal Constitution, as interpreted by the Supreme Court in *Zurcher*. The suggested statutory provisions would also give the press more protection than the California legislation, in light of recent state court interpretations of the state shield law. Federal legislation has the additional advantage of providing national uniformity. In addition, by requiring the use of a subpoena duces tecum, the proposed legislation safeguards the interests of society and the press in unfettered newsgathering and dissemination, while insuring criminal investigations will not be hampered.

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